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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 727

THE SHAMROCK OIL AND GAS CORPORATION, PETITIONER,

VS.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER, THE SHAMROCK OIL AND GAS CORPORATION.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Shamrock Oil and Gas Corporation, petitioner herein, submits this brief in reply to the brief of respondents filed herein. This reply will be limited to the matters urged under Points II and III of Respondents' Brief.

POINT I.

(In Reply to Point II of Respondents' Brief.)

Summary:

Petitioner, being a non-resident defendant in a cross-action seeking affirmative relief for more than $3,000.00, is a "defendant" within the removal statute, without regard to whether the original action filed by petitioner was for more or less than the jurisdictional amount of $3,000.00.

Argument and Authorities Under Point I.

It is true that in some, but not all, of the cases cited by petitioner in support of the right of removal, and shown at pages 13 and 14 of its brief filed herein, that the original action therein was for an amount less than the requisite jurisdictional amount of the federal courts. The fact that the original plaintiffs in such suits could not have gone into the federal court in the first instance was assigned in some of the opinions as an additional reason why the removal in such cases should be permitted when the original plaintiff, in his turn, became a defendant in a cross-action seeking affirmative relief. In each instance where such matter was discussed, however, the conclusion that the case was removable was based on other and more substantial grounds, to-wit: that the original party plaintiff, insofar as the cross-action seeking affirmative relief was concerned, became a defendant and therefore entitled, within the meaning and intent of the removal statute, to remove the case presented by the cross-action to the federal court.

Petitioner respectfully submits that it should not be penalized by a denial of the right to remove the suit against it because it had instituted another suit in the state court, particularly so where the damage suit filed against it was entirely unrelated to and grew out of contracts of a different date and completely separate and distinct from the indebtedness sued upon. Since the suit filed against petitioner was entirely separate and unrelated to the petitioner's original suit, and since the petitioner could not have anticipated that a cross-action for damages for a breach of an entirely separate and distinct contract would be presented in a cross-action, and since petitioner did nothing inconsistent with its right to remove the cross-action to the federal court, it can not be logically said that petitioner in any wise waived its right to remove its cross-action or selected the state court as the forum to try the separate suit presented by the cross-action, since waiver is a question of intent which must clearly appear. *Houlton Savings Bank* v. *American Laundry Machinery Company,* (D. C. Me. 1934), 7 Fed. Sup. 858; *Stuart* v. *United Benefit Life Insurance Company,* (D. C. N. C. 1933), 2 Fed. Sup. 641; *McMillen* v. *Indemnity Insurance Company of North America,* (D. C. Mo. 1925), 8 Fed. (2d) 881; *Atlanta, K. & N. Ry. Company* v. *Southern Ry. Company,* (C. C. A. Sixth Circuit 1904), 131 Fed. 657; *Whiteley Malleable Castings Company* v. *Sterlingworth Railway Supply Company,* (D. C. Ind. 1897), 83 Fed. 853; *Payne* v. *Beaumont,* (Tex. C. C. A. 1922, Writ Refused), 245 S. W. 94.

The privilege of removal and the right to resort to the federal courts is a valuable right. Such fact has been recognized by this Honorable Court and such privilege has been protected by holdings that such right can not be defeated by the fraudulent joinder of a resident defendant: *Wilson* v. *Republic Iron and Steel Company,*

(1921), 257 U. S. 92, 66 L. Ed. 144, 42 S. C. 35; *Chesapeake and Ohio Ry. Company* v. *Cockrell,* (1914), 232 U. S. 146, 58 L. Ed. 544, 34 S. C. 278; *Pullman Company* v. *Jenkins,* (1939), 305 U. S. 534, 83 L. Ed. 334, 59 S. C. 347; and by holdings that such right or privilege of removal or the jurisdiction of the federal courts can not be abridged or impaired by state statute: *Barrow Steamship Company* v. *Kane,* (1898), 170 U. S. 100, 42 L. Ed. 964, 18 S. C. 526; *The Southern Pacific Company* v. *Denton,* (1892), 146 U. S. 202, 36 L. Ed. 942, 13 S. C. 44; *Barron* v. *Burnside,* (1887), 121 U. S. 186, 30 L. Ed. 915, 7 S. C. 931; *Home Insurance Company of New York* v. *Morse,* (1874), 87 U. S. (20 Wall.) 445, 22 L. Ed. 365. This Honorable Court has on numerous occasions, as pointed out at page 16 of petitioner's brief filed herein, held that in determining the right of removal the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant.

It is respectfully urged that in line with the established precedent to protect the privilege of removal as evidenced by the above decisions that this Honorable Court should hold, in a case of the kind here presented, where the cross-action seeks affirmative relief for damages for breach of a contract of a different date and separate and distinct from the account originally sued upon, that the defendant in such cross-action is entitled to remove even though such party might likewise be the plaintiff in the original but unrelated suit.

The Court in this suit is not called upon to decide the right of removal in a cross-action that is so interrelated to the matters involved in the original action that the cross-action is merely ancillary to the main suit, as the cross-action here involved is entirely separate and

unrelated. To avoid multiplicity of actions Texas statutes permit, but do not require, a cross-action involving a wholly unrelated matter, such as is here presented, to be filed as a counter-claim. Articles 2015, 2014, Revised Civil Statutes of Texas (Notes 1 and 2 Appendix); *Thomas* v. *Hill,* (1848), 3 Tex. 270; *Barton* v. *Farmers' State Bank,* (Section A, Tex. Com. App. 1925), 276 S. W. 177 at 180-181; *Johnson* v. *Shambeck,* (Section B, Tex. Com. App. 1929), 13 S. W. (2d) 350; *Ferguson* v. *Plainview National Bank,* (Tex. C. C. A. 1931), 42 S. W. (2d) 834. When such counter-claim is filed, the plaintiff can urge such defenses to the counter-claim as an original defendant. Article 2004, Revised Civil Statutes of Texas (Note 3, Appendix). Such counter-claim remains as a suit even though the original action be dismissed. Article 2016, Revised Civil Statutes of Texas (Note 4, Appendix). The right to set off an unliquidated demand against a liquidated demand and vice versa is not authorized if the plaintiff timely objects, Article 2017, Revised Civil Statutes of Texas (Note 5, Appendix). This is not a jurisdictional statute, however, but merely grants a privilege to the plaintiff which he may waive. *Montgomery* v. *Gallas,* (Tex. C. C. A. 1924), (Writ Refused), 257 S. W. 956; *A. B. Frank Co.* v. *A. H. Motley Co.,* (Tex. C. C. A. 1896), 37 S. W. 868; *Wentworth* v. *King,* (Tex. C. C. A. 1899), (Writ of Error dismissed by Tex. Sup. Ct. for want of jurisdiction), 49 S. W. 696; *Gillett* v. *Moody,* (Tex. C. C. A. 1899), 54 S. W. 35; *Gibson* v. *Singer Sewing Machine Co.,* (Tex. C. C. A. 1912), 147 S. W. 285; *Christian-Holmes Cedar Company* v. *Dewees Cedar Company,* (Tex. C. C. A. 1920), 221 S. W. 681; *Briggs* v. *Ladd,* (Tex. C. C. A. 1933), 64 S. W. (2d) 389. As will appear from the judgment of the trial court (R. 81) and the charge of the Court to the jury (R. 77) the petitioner, defendant in cross-action, raised no objection to the right to present the cross-action herein and pro-

ceeded to trial and requested an instructed verdict upon such cross-action which was granted. The trial court therefore had jurisdiction of the cross-action here involved, and it is urged that where such a separate and distinct suit as is here involved is presented, the defendant in such suit should be permitted to remove same.

POINT II.

(In Reply to Point III of Respondents' Brief.)

Summary:

The cross-action filed by respondents in the state court sought affirmative relief in the form of damages for more than $3,000.00 and was both in effect and in fact an action that could have originally been filed and maintained in the federal court as an independent suit, and could therefore be removed from the state to the federal court by the non-resident defendant therein.

Argument and Authorities Under Point II.

It makes no difference by what name you call the cross-action filed by respondents in the state court, such cross-action has all of the attributes of a suit, and is in fact a suit. (Same (R. 67, 68) alleges a contract relative to the leasing of an automobile truck. It alleges a breach of such contract. It alleges damages sustained by the respondents as a result of the alleged breach by the petitioner. Damages for such breach are sought against the petitioner as defendant. Such allegations constitute a sufficient pleading of a cause of action for damages as a result of a breach of contract. The answer and cross-action (R. 64 and 67) reflect the plaintiffs in such cross-action to be residents of the State of Texas and the defendant in such cross-action to be a non-resident of the State of Texas. It makes no difference whether you refer to the prayer of such cross-action for assistance in de-

termining the allegations made in such cross-action or whether you look at the allegations in such cross-action unaided by the prayer for relief. Same reflects to be a claim for damages in excess of $5,000.00 for breach of a contract and as such presents a suit that could have been originally instituted and maintained in the Federal Court as an independent action.

Respondents urge various and conflicting claims as to the character of relief sought under such cross-action. Petitioner submits that the prayer for relief and the answer to the plaintiff's suit may be looked to for aid in determining the intent and effect of the pleading as a cross-action. In the answer proper (R. 64 to 67) it was claimed that the goods sold by petitioner to respondents were sold under a void contract, contrary to the Texas Anti-Trust or Anti-Monopoly Statutes. If this defense were sustained, the petitioner as the original plaintiff would not have been entitled to recover against the respondents on its account. *W. T. Raleigh Company v. Land, et al.*, (Tex. Com. App. 1926), 279 S. W. 810. If such defense had been sustained, this would have left the respondents' cross-action to be tried. This fact, and the fact that the cross-action was not in the alternative to be urged only if the defense of void contract was overruled, demonstrate that the cross-action was not merely a defensive matter ancillary to the original suit. The account and indebtedness sued upon was not denied by respondents under Article 3736, Revised Civil Statutes of Texas as amended in 1931 (Note 1, Appendix Petitioner's Brief) nor was same denied in the answer of respondents as is required under Section 11 of Article 2010, Revised Civil Statutes of Texas (Note 6, Appendix herein). This further demonstrates that offense and not defense was the object of the cross-action since the correctness or justness of the account was not defended

against. Such failure to deny under oath is a circumstance indicating that respondents did not consider their cross-action as defensive but as one seeking affirmative relief.

The running account sued upon had its inception on June 16th, 1938 (R. 4). The contract sued upon in the cross-action was entered into on or about the 1st day of February, 1939, according to respondents' allegations (R. 67). The very difference in dates demonstrates that the two are separate and unrelated. In addition to the authorities cited at pages 8 and 9 of petitioner's brief herein to the effect that the character of cross-action presented here is an independent suit, petitioner cites the following cases as supporting such proposition: *Bates* v. *Republic of Texas,* (Tex. Sup. Ct. 1847), 2 Tex. 616; *Branscun* v. *Reese,* (Tex. C. C. A. 1919), 219 S. W. 871; *Dickson* v. *Watson,* (Tex. C. C. A. 1909, Writ Dismissed), 115 S. W. 100; *Bishop* v. *Mount,* (Tex. C. C. A. 1913), 152 S. W. 442; *Cameron* v. *Williams,* (Tex. C. C. A. 1918, Writ Refused), 203 S. W. 928; *Commercial Investment Trust, Inc.* v. *Smart,* (Tex. Com. App. 1934), 67 S. W. (2d) 858.

Petitioner respectfully submits that it is really of no importance whether the matters urged in the cross-action are related to the matters involved in the original suit or are independent thereof since the cross-action is one seeking affirmative relief and is a suit under the decisions last referred to. In this case, however, since the cross-action so clearly reflects that it involves a matter wholly unrelated to the account originally sued upon, additional reasons and equities for permitting the defendant in such suit to remove are presented.

Turning to the question of the amount sought in the cross-action, petitioner respectfully submits that the au-

thorities are contrary to the respondents' contention that only $2,200.00 is involved in the cross-action. It has been the consistent holdings of Texas courts, where a cross-action seeking affirmative relief is filed, that the amount involved in the cross-action is the amount sought therein and not the balance due after the claim of the defendant in the cross-action is deducted from the claim of the plaintiff in the cross-action. The question has been considered in Texas most frequently in connection with the jurisdiction of the county or justice courts, their jurisdiction in civil cases being limited to maximum amounts of $1,000.00 and $200.00 respectively. *Gimbel & Son* v. *Gomprecht & Co.,* (Tex. Sup. Ct. 1896), 89 Tex. 497, 35 S. W. 470; *Pennant Oil and Gas Company* v. *Lightfoot,* (Tex. Com. App. 1927), 292 S. W. 517; *Hardeman* v. *Morgan,* (Tex. Sup. Ct. 1877), 48 Tex. 103; *Smith* v. *Dye,* (Tex. C. C. A. 1899), 52 S. W. 981; *Clark* v. *Smith,* (Tex. C. C. A. 1902), 68 S. W. 532; *Pennybacker* v. *Hazlewood,* (Tex. C. C. A. 1901), 61 S. W. 153; *Russell* v. *Safford,* (Tex. C. C. A. 1920), 225 S. W. 281. This same principle is applied and enforced in the federal courts: *Turner* v. *Southern Home Building and Loan Association,* (C. C. A. Fifth Circuit—appealed from Northern Dist. of Texas, 1900), 101 Fed. 308; *Pickham* v. *Wheeler-Bliss Manufacturing Company,* (C. C. A. Seventh Circuit, 1897), 77 Fed. 663, Certiorari denied 168 U. S. 708, 42 L. Ed. 1211, 18 S. C. 945; *Morrow* v. *Mutual Casualty Company of Chicago,* (D. C. Ky. 1937), 20 Fed. Sup. 193.

The prayer to the answer and cross-action of respondents makes it manifest that the respondents deemed and treated their cross-action as a suit for affirmative relief for the amount of $7,200.00, but even if the body of the allegations in the cross-action is looked to in determining the amount claimed under such cross-action as is contended by respondents, such allegations reflect that

such claim is for an unnamed amount in excess of $5,000.00. In either instance a suit above the jurisdictional amount of the federal court is presented.

No attempt has been made to answer all of the conflicting contentions of respondents relative to the cross-action being defensive, but it is respectfully submitted that the cross-action speaks for itself and reflects to be one seeking affirmative relief for more than $5,000.00 against a non-resident defendant upon a matter unrelated to the account sued upon, and that same presents a suit that was properly removed in due time.

Conclusion.

Petitioner prays that, for the reasons and authorities herein assigned and urged and assigned and urged in the brief of petitioner heretofore filed herein, the judgment of the Honorable Circuit Court of Appeals in this case should be reversed and the judgment and ruling of the trial court should be affirmed.

Respectfully submitted,

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APPENDIX.

NOTE 1.—Article 2015, Revised Civil Statutes of Texas:

> "Whenever any suit is brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter claim he may have against the plaintiff, subject to such limitations as may be prescribed by law. The plea setting up such counter claim shall state distinctly the nature and the several items thereof, and shall conform to the ordinary rules of pleading."

NOTE 2.—Article 2014, Revised Civil Statutes of Texas:

> "When a defendant shall desire to prove payment, counter claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter claim or set-off, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

NOTE 3.—Article 2004, Revised Civil Statutes of Texas:

> "When the defendant sets up a counter claim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable. Whenever the defendant is required to plead any matter of defense under oath, the plaintiff shall be required to plead such matters under oath when relied on by him."

NOTE 4.—Article 2016, Revised Civil Statutes of Texas:

"Where the defendant has filed a counter claim seeking affirmative relief, the plaintiff shall not be permitted, by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counter claim."

NOTE 5.—Article 2017, Revised Civil Statutes of Texas:

"If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff. If the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff. However, the defendant may plead in set off any counter claim founded on a cause of action arising out of or incident to, or connected with, the plaintiff's cause of action."

NOTE 6.—Article 2010, Revised Civil Statutes of Texas:

"An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:

* * * * *

"11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just; and, in such case, the answer shall set forth the items and particulars which are unjust. * * * * *."

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